James H Cunningham III
California Men's Colony State Prision
P.O. BOX 8101 (62)
San Luis OBISPO, CA. 93409-8101
In Pro Per

2254 ✓ 1983
FILING FEE PAID
Yes ___ No ✓
IFP MOTION FILED
Yes ✓ No ___
COPIES SENT TO
Court ✓ ProSe ___

FILED
NOV 13 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

'07CV 2183 DMS RBB

UNITED STATES District Court
SOUTHERN District of CALIFORNIA

James Cunningham
Petitioner,

V.s

John Marshall (Warden CMC)
Respondent

MOTION for stay And Abeyance of Federal Habeas Corpus Petition To Exhaust Additional unexhausted Claims in The State Courts.

Petitioner, James Cunningham in proper, respectfully moves this Honorable court for a stay and abeyance of his Federal habeas Petition, while Petitioner goes back to the State Court to exhaust additional unexhausted claims that were not included in the Petition in wake of The U.S. Supreme Court recent decision in - Rhines V. Weber 2005 124 S.Ct. 1528.

This motion is based on the facts and memorandum of authorities stating why the District court should grant the petitioners stay and abeyance.

Memorandum Points and Authorities

A Federal Court has no power to hear a mixed Petition, and must either 1). Dismiss the entire Petition without PreJudice (Meaning you can file again without running into the successive Petition Bar); or 2). Allow the Petitioner to dismiss the unexhausted claims and go forward in federal Court with an amended Petition containing only the exhausted claims.

Making one of the claims creates a dilema for the federal Petitioner. The problem with alternative (2) is that it requires the Permanet dismissal of unexhauted claims /or unexhausted facts within otherwise exhausted claims) which might upon exhaustion, have a better chance of success than the already exhausted claims.

The Problem with (1) is that although the dismissal is without PreJudice the time spent in federal Court prior to the dismissal is not tolled against the AEDPA Statue of limitations. Usually, by the time a federal Court gets around to issuing a ruling forcing the petitioner to deal with a mixed petition, what ever time remained on the Statue of Limitation will have have been used up, so that it will be impossible to go back to the state Court, exhaust and come back to federal Court without the new federal Petition being barred by statue of Limitations.

In an effort to deal with the dilemma Lower federal courts began offering the Petitioner "stay and abeyance" as a third alternative allowing the petitioner to stay the Federal petition the Petitioner returned to the state Court to exhaust his unexhausted claims (see, e.g. Kelly v. Small, 315 F.3d 1063 (9th Cir 2003)

stay and abeyance allows the Petitioner to return to the state Court to exhaust additional unexhausted claims, but as long as he files the state exhausted claims, Promptly of his unexhausted claims and promtly returns to Federal Court after Exhaustion is completed the original federal Petition will be there awaiting, and the Petition can simply Move to amend the stayed Petition to add the newly exhausted claims.

The U.S. Supreme Court upheld the discretion of a district Court Judge to order stay and abeyance as an alternative to dismissal (Rhines v. Weber (2005) 124 S. Ct. 1528).

The unexhausted claims are newly discovered and are "Potentially Meritorious" because it will reduce Petitioners crime and good cause for the failure to exhaust the unexhausted claims before filing in federal Court is shown based on the fact that these fact's were not known and could not at any time be presented at an earlier time (see in People v. Shipman (1965) 42 Cal. Rptr. 1; In re Clark 21 Cal. Rptr. 2d 509.

Petitioner here by respectfully request that the District Court order a stay and abeyance of His Federal habeas Corpus Petition to Exhaust additional unexhausted claims, while Petitioner retured to state court to exhaust his unexhausted claims under (Kelly v. Small, supra).

I, James Cunningham declare under Penalty of Perjury that the foregoing is true and correct to the best of my Knowledge and beliefs. Excuted on November 2, 2007 at CMC San Luis OBISPO, Ca. 93409-8101

Respectfully Submitted

[signature]

Petitioner In Pro Per

To Legal Officials: INTRODution 9-7-2007

I, JAMES H. CUNNINGHAM AM SEEKING Advice, suggestion reference, Alliance ANY type of help dealing with MY CASE. Here is MY Story please bear with ME! I'M just trying to touch Legal bases ON MY Appeals CASE that's in dying NEED of Legal support I CAN't do it Alone. A Jury found ME guilty of assault with a fire Arm (Pen. code 245. subd. (A) (2) Possession of A deadly weapon (12020. subd. (A) (1) The jury Also found ME guilty of using a fireArm during the commission of (12022.5 subd. (A). I WAS found innocent of the (459) subd.

In the second portion of the bully trial MY Attorney thought it would be wise on the Judge to let His court room take care of 20 And 10 yr. old strike I sign for it but when it CAME down to sentencing the Judge decline too. I plead guilty to (667. sud (A) (1) 668. 11927 subd. (c) And A prior strike conviction (667 subds. (b)-(i) 668. 1170.12) stemming from A 1985 robbery conviction.

The trial court sentenced I, JAMES H. CUNNINGHAM to 12 yrs. in state Prison. I'm presently incarcerated in California Mens Colony state Prison P.O. 8101 San Luis CA 93409-8101.

I WAS represent during trial Deputy Attorney Mr. Stacy Dully WAS MY Counsel His office is Located at Public Defenders 233 A st. El cajon CA. MY Superior Court CASE # is SCE243638. MY Attorney file for MY appeal in a timely fashion 5-13-05. a few Months Later I WAS contacted Appellate Denfenders INC. Located At 555 West Beech st. Suite 300, San Diego CA.

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92101-2939. PH.# (619)-696-0282 automated Attended: (619)-699-0284 www.adi San Diego.Com. from there Ms. Susan Keiser was appointed to counsel I. My case number is D046320. Ms. Keiser is located at 3453 Ingraham St. #85 San Diego CA. from there Ms. Keiser prepare my appeal case through her research she prepared my opening brief dated 9-6-2005. When she went into Appeals Court where she was denied on the appeal though she stated we had argument that was relevant. She also was offer more argument but the Appellated court stood affirmed with Judge William Mc Grath, of the Superior Court of San Diego.

The Appellate Court gave no opinon about the opening brief it was a unpublished opinion. On appeal Petitioner shows error where the trial court erred in excluding evidence.

I. Whether: The trial court error by denying appellant's request to cross-examine Rebecca Knox regarding her prior domestic violence accusations against her Husband, Christopher Knox she later recanted and thereby violated Appellant's State, and Federal constitutional rights to present a defense and to cross-examine witnesses against him.

So my concern is (A.) denied argument (B.) The right to present evidence and to cross-examine (C.) Legal standards impeachment evidence. Can I have penal codes too combat those issues with? II And whether: The trial court erred in giving Caljic number 2.52 the statutory flight instruction over Defence

objection thereby Violating Appellant's due process rights.
I would Like too Know whether Law governing flight instruction has any Merit. Defence say's objections to Pattern flight as well including there was no flight that indicated consciousness of guilt. Also did the pattern instruction required Modification and preliminary fact find in this case.
whether: A. can I have a summary of Argument & quotation
B. Law governing flight instructions
C. How to submit application to the instant case
III whether: The court erred by denying The Defense request to instruct with CALJIC Number 12.50 when the evidence warrant such instruction, and the failure to instruct impermissibly reduced the prosecution's the burden of proof and Violated Appellant's due process and trial rights. A. How can I confront the summary of Argument
B. Defense request for CALJIC number 12.50
C. Law governing Self-defence as affirmative to Penal Code Section 12021
d. what are the standard of review and prejudice.

Those I II III. where the three serious issues Appellate Counsel sought out to be reversed but was ignored by Appellate Court. Since not getting any kind of opinion to these seriou issues not being address with certificate by appeals Court. My counsel Petition for satisfactory toureds

California Supreme Court by preparing a review. Counsel was determine to show triers of fact that all these issues are not susceptible to harmless error review.

So counsel Ms. Kesier prepare a petition for the state Surpreme Court. The unpublished opinion for review was done April 3, 2006 C:\...\2004 CASES\Cunningham.Pfr. Her conclusion for the matters should of been granted what do you think?

But to my unpleasent surprise review was denied by California surpreme court with out reason too Petitioner 5-17-06 from there I recieved a letter certified that my counsel Her self could not represent me any futher in my case.

She advised me to file for a extention an that I, did have good graument and good luck. There was no tell of reason, I had no one to be tentative to my case.

I took it upond myself to go forward with a Writ of Habeas-Corpus in the United States Southern District California Supreme Court located at 88 front st, Suite 4290 San Diego CA 92101-8900.

On or about. I recieved legal mail stating that I might have or not exhausted my state remmedies Civil No. 06-2168 J M (CAB) So from there I wrote as Pro se Nov 2, 2006 too U.S.S.D.C an ask for my case to be dismiss without prejudice.

So that I could go back into state supreme court an exhaust all my brought up issues. Nov 13, 2006 Clerk of U.S. district court Southern Division inform me of the filing.

CASE: 3:06-cv-02168- On September 29, 2006, Petitioner a state prisoner proceeding pro se, filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C § 2254. On October 17, 2006, the Court sent Petitioner a document entitled "Notice regarding Possible failure to Exhaust and One Year statute of Limitations" which notified Petitioner of his obligation under 28 USC' 2254 to exhaust his state court remedies and the one-year statute of limitation, contained in 28 U.S.C ' 2244 which applies to petitioner filed pursuant to 28 U.S.C. § 2254

Motion To Dismiss

The notice sent to Petitioner stated that Petitioner was not required to take any action and that the court had not yet determined whether any of my claims were unexhausted. Nevertheless on November 13, 2006. I the Petitioner filed a notice and requested for dismissal without prejudice so to exhaust Habeas Corpus claims. Petitioner states in his declaration in support of his motion that "Upon further examination of my claim, I have found that I am within the statute of Limitation and I have, I believe an unexhausted claim in my claim two" and that I believe-s it is in the best interest of all concern that I attempt to exhaust my claim two with the State Court. Based on the assertions Petitioner makes in his declaration the Court grants Petitioner motion to dismiss his Petition without Prejudice.

Motion to Proceed in forma Pauperis

I, also filed a motion to proceed in forma Pauperis in response to the Court's October dismissal order. Because the court has granted Petitioner's motion to dismiss his case without prejudice the court denied my motion to proceed in forma pauperis as Moot. It was done on 12-4-2006 by United States District Judge. Jeffrey T Miller. from there I prepared a habeas corpus. Mine you that I have no real legal elisible skills going into Cal. state supreme court. I took some advice got what I could from the library computer. well. I did what I could an put a state habeas corpus together an sent it off in March. 2007. I got a replie that it was filed april 9th 2007. from there I recieve legal mail informing me that my petition for writ of habeas corpus was denied. (accept referall's to "pro-bono's.)

The court offer me to see (in re Waltreus (1995) 62 Cal. 2d 218: In re Dixon (1953) 41 Cal. 2d 756: In re Swain (1949) 34 Cal. 2d 300. 3004: people v. Duvall (1995) 9th Cal. 4th 464, 474: In re Lindley (1947) 29 Cal. 2d 709. I can tell you I have read the 9th & 4th but I still need the break down of the statments. If I'm some what a little correct too my knowlege I'm late with the appeal arguments and motions should of been brought up in the first level of trial.

Please! correct me if I'm wrong would you kindly give me a road map too freedom an Justic? I'm really hoping for your counsel an direction I don't feel I can do it without support and any type of counsel an direction I feel it's key. Here is some of my supporting cases, rules.

Authorites: Cal. Cont article 17 § 15 Woodford v Garceau (2003) 538 U.S. 202, 207 Saffle v Parks (1990) 494 U.S. 484, 495 Chambers v. Mississippi (1973 410 U.S. 234, 295 Tennessee v. Street (1992) 471 U.S. 409, 415 White v. Illinois (1992) 502 U.S. 346, 355 Dutton v. Evans (1970) 400 U.S. 74, 89 White v. Illinois (1992) 502 U.S. 346, 355 Ponter v. Texas (Sixth & Fourtheenth amendment, U.S. Cont., Crawford & Washington (2004) 541 U.S. 36,

[illegible] Thank You For Listening.

S151640

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JAMES CUNNINGHAM on Habeas Corpus

The petition for writ of habeas corpus is denied. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756; *In re Swain* (1949) 34 Cal.2d 300, 304; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Lindley* (1947) 29 Cal.2d 709.)

SUPREME COURT
FILED
AUG 22 2007
Frederick K. Ohlrich Clerk
DEPUTY

GEORGE

Chief Justice